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In the Supreme Court of the United States

OCTOBER TERM, 1997

NATIONAL ASSOCIATION OF HOME BUILDERS, ET AL.,
PETITIONERS

v.

BRUCE BABBITT, SECRETARY OF THE INTERIOR, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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QUESTION PRESENTED

Whether Congress has power under the Commerce Clause of the Constitution to prevent the extinction of species by prohibiting the "taking" of species listed as endangered, including species that live entirely within the boundary of a single State.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 23a-91a) is reported at 130 F.3d 1041. The opinion of the district court (Pet. App. 1a-22a) is reported at 949 F. Supp. 1.

JURISDICTION

The judgment of the court of appeals was entered on December 5, 1997. The petition for a writ of certiorari was filed on March 5, 1998. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. The Endangered Species Act of 1973 (ESA or Act), 16 U.S.C. 1531 *et seq.*, mandates protection and conservation measures for species of fish or wildlife determined to be endangered or threatened. Administration of the ESA is divided between the Fish and Wildlife Service (FWS) in the Department of the Interior and the National Marine Fisheries Service in the Department of Commerce. See 16 U.S.C. 1532(15); 50 C.F.R. 402.01(b).

Under Section 4(a) of the Act, the relevant Secretary determines whether to list a species as "endangered" or "threatened," based on factors that include the "present or threatened destruction, modification, or curtailment of its habitat or range" and "overutilization for commercial, recreational, scientific, or educational purposes." 16 U.S.C. 1533(a)(1)(A) and (B). In determining whether listing of a species is warranted, the Secretary must take into account the efforts to protect the species undertaken by States or their political subdivisions. 16 U.S.C. 1533(b)(1)(A). The term "endangered species" includes "any species which is in danger of extinction throughout all or a significant portion of its range other than a species of the Class Insecta determined by the Secretary to constitute a pest whose protection under the provisions of this chapter would present an overwhelming and overriding risk to man." 16 U.S.C. 1532(6).

Once a species is determined to be endangered or threatened, several related protections apply. At issue in this case is Section 9(a)(1)(B) of the Act, which generally makes it unlawful to "take" any endangered species of fish or wildlife. 16 U.S.C.

1538(a)(1)(B).[1] The term "take" is defined to mean "harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct." 16 U.S.C. 1532(19). The FWS has further defined the term "harm," as used in the definition of "take," to include:

> an act which actually kills or injures wildlife. Such act may include significant habitat modification or degradation where it actually kills or injures wildlife by significantly impairing essential behavioral patterns, including breeding, feeding, or sheltering.

50 C.F.R. 17.3.[2]

The ESA does not impose an absolute prohibition on all takings of listed species. Pursuant to Section 10(a) of the Act, the Secretary may issue permits authorizing incidental takings that are not likely to jeopardize the continued existence of the listed species. 16 U.S.C. 1539(a). To secure a Section 10(a) permit, the applicant must submit a conservation plan that specifies (1) the impact that will likely result from the taking; (2) the steps the applicant is pursuing to minimize those impacts and the funding available to implement those steps; (3) the alternatives the applicant considered and the reasons they were rejected; and (4) any other measures the Secre-

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[1] By regulation, FWS has extended the proscriptions of Section 9(a)(1) to threatened species. 50 C.F.R. 17.31(a), 17.21(c).

[2] In *Babbitt* v. *Sweet Home Chapter of Communities*, 515 U.S. 687, 708 (1995), this Court concluded that "the Secretary reasonably construed the intent of Congress when he defined 'harm' to include 'significant habitat modification or degradation that actually kills or injures wildlife.' "

tary deems necessary or appropriate. 16 U.S.C. 1539(a)(2)(A)(i)-(iv).

Section 11 of the Act sets forth enforcement mechanisms and penalty provisions. The Attorney General is authorized to seek injunctive relief against persons alleged to be in violation of the ESA. 16 U.S.C. 1540(e)(6). The Secretary may assess civil monetary penalties, 16 U.S.C. 1540(a), and persons who commit knowing violations of the Act are subject to criminal sanctions, 16 U.S.C. 1540(b). The Act also contains a "citizen suit" provision that authorizes "any person" to sue to enjoin violations. 16 U.S.C. 1540(g)(1).

2. In October 1989 and July 1990, FWS received petitions proposing that the Delhi Sands Flower-Loving Fly (*Rhaphiomidas terminatus abdominalis*) be listed as endangered. In December 1990 FWS published a finding that substantial information had been presented to indicate that listing might be warranted. 55 Fed. Reg. 52,852. In November 1992, FWS published a proposed rule to list the Fly as endangered. 57 Fed. Reg. 54,547. On September 23, 1993, the agency issued a final determination that the Fly is an endangered species. 58 Fed. Reg. 49,881.

In its final rule, FWS found that the Fly is in "imminent danger of extinction due to extensive habitat loss and degradation that has reduced its range by 97 percent." 58 Fed. Reg. 49,881 (1993). FWS also found that commercial and scientific utilization imperiled the species, noting that "*Rhaphiomidas* flies are prized because of their unusual size, coloration, and rarity." *Id.* at 49,885.[3] There are currently only five

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[3] Prior to its listing as endangered, specimens of the Delhi Sands Fly were sold in interstate commerce to collectors. C.A. App. 447-456.

known populations of the Fly, all of which are located within an eight-mile radius in Riverside and San Bernardino Counties, California. *Id.* at 49,884. As required by the Act, see 16 U.S.C. 1533(b)(1)(A), FWS considered whether state and local regulation would be adequate to preserve the species. After noting that the California Department of Fish and Game "has determined that it is unable to protect insects under current State regulations," and that local planning efforts were not adequately providing for conservation of the Fly, FWS concluded that "existing regulatory mechanisms are inadequate to protect this species and its habitats." 58 Fed. Reg. 49,885 (1993).

3. In July 1992, the San Bernardino County Board of Supervisors authorized acquisition of a site for a new county hospital. C.A. App. 163. The 76-acre site contains habitat of the Delhi Sands Flower-Loving Fly. *Id.* at 347. When the Fly was proposed for listing, FWS notified a County authority of the potential listing of the species, and discussions ensued regarding steps that could eliminate the need for individual Section 10 permits. *Id.* at 409. In May 1993, prior to the final decision to list the Fly as an endangered species, FWS advised the County that the hospital site was occupied by the Fly and that construction of the facility as proposed would likely take members of the species. *Id.* at 410. The County elected to modify the layout of the hospital to eliminate impacts to the Fly and the need for a Section 10 permit. *Id.* at 347, 668. The County developed a Habitat Preservation Plan, under which the location of the planned hospital would be moved 250 feet north, and 8.35 acres would be set aside for a protected Fly habitat. *Id.* at 352, 410-411, 675, 678. The plan also

created a 100-foot wide corridor linking two Fly habitat areas. Pet. App. 29a.

In October 1994, the City of Colton approached FWS with a proposal to build an electrical substation to serve the hospital. C.A. App. 412. The substation was to be located on the protected Fly habitat at the hospital site. *Ibid.* The City proposed to destroy about 4 acres of Fly habitat and to acquire a 7.5-acre site as Fly habitat to offset that loss. *Id.* at 413. In connection with that proposal, the City submitted an application to FWS for incidental take of the Fly. *Ibid.* In November 1995, FWS issued the Section 10(a) permit, and construction of the substation began shortly thereafter. *Ibid.*; see Pet. App. 29a-30a.

4. The petitioners in this case are the County, the City of Colton and the City of Fontana, and two building industry organizations. On October 20, 1995, petitioners filed suit against the Secretary of the Interior and the Director of FWS. Petitioners sought a declaration that Section 9(a)(1)(B) and implementing regulations are unconstitutional as applied to protect the habitat of an intra-state species on non-federal land. Pet. App. 30a; C.A. App. 491-518.[4]

The district court granted the government's motion for summary judgment. Pet. App. 1a-22a. Enactment of the ESA, the court observed, reflected congressional concern about the accelerating pace of

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[4] In November 1995, the County informed FWS that it intended to redesign an intersection near the hospital in order to facilitate access by emergency vehicles. Pet. App. 30a. That alteration would have reduced from 100 to 18 feet the width of the corridor between Fly habitations described in the Habitat Preservation Plan. *Ibid.* FWS informed the County that redesign of the intersection would probably effect a prohibited taking of the Fly. *Ibid.*

extinctions and the inadequacy of state efforts to prevent the loss of a "genetic heritage" of "incalculable" value. *Id.* at 12a (quoting H.R. Rep. No. 412, 93d Cong., 1st Sess. 4 (1973) (House Report)). The court concluded that "[t]he application of 16 U.S.C. § 1538(a)(1)(B) to the Fly is a valid exercise of Congress' power under the Commerce Clause." Pet. App. 16a. It explained that wildlife generally, and the Fly in particular, have frequently been transported in interstate commerce. *Id.* at 17a-18a.[5] The court noted that even purely intrastate activity is subject to congressional regulation under the Commerce Clause "where the activity, combined with like conduct by others similarly situated, affects commerce among the States." *Id.* at 19a (quoting *Fry* v. *United States*, 421 U.S. 542, 547 (1975)). It concluded that "[t]he 'taking' of individual species located entirely within one state, would clearly, in the aggregate, have a significant effect upon interstate commerce." Pet. App. 19a.

5. The court of appeals affirmed. Pet. App. 23a-91a. Judge Wald and Judge Henderson, while agreeing that the ESA is constitutional as applied to the present

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[5] With respect to the Fly in particular, the court explained that

> the government has offered uncontroverted evidence that the Fly is, and would likely continue to be, an article in interstate commerce. The Fly is currently on exhibit in at least three museums located outside of the state of California. In addition, the Fly has been the subject of interstate trade among insect collectors. Lastly, interested persons have traveled from outside the state of California to observe and study the Fly.

Pet. App. 18a (footnote omitted).

case, issued separate opinions. Judge Sentelle dissented.

A. Judge Wald first determined that application of the ESA's "take" prohibition to the Fly is a constitutional exercise of Congress's authority to regulate the channels of interstate commerce. Pet. App. 34a-41a. She stated that "[t]he ESA's prohibition on takings of endangered species can be justified as a necessary aid to the prohibitions in the ESA on transporting and selling endangered species in interstate commerce." *Id.* at 35a. She concluded as well that "[t]he prohibition on takings of endangered animals also falls under Congress' authority to prevent the channels of interstate commerce from being used for immoral or injurious purposes." *Id.* at 38a.

Judge Wald also determined that application of the "take" prohibition constitutes permissible regulation of activities having a substantial effect on interstate commerce. Pet. App. 41a-65a. She explained that "the committee reports on the ESA discuss the value of preserving genetic diversity and the potential for future commerce related to that diversity." *Id.* at 48a. She noted that "endangered plants and animals are valuable as sources of medicine and genes," *id.* at 51a; that "the genetic material of wild species of plants and animals is inbred into domestic crops and animals to improve their commercial value and productivity," *id.* at 52a; and that the extinction of existing species "has a substantial effect on interstate commerce by diminishing a natural resource that could otherwise be used for present and future commercial purposes," *id.* at 53a.[6] Judge Wald further concluded that "[t]he

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[6] Judge Wald explained that "because we know that in the aggregate the extinction of endangered species will have a

taking of the Fly and other endangered animals can also be regulated by Congress as an activity that substantially affects interstate commerce because it is the product of destructive interstate competition," *id.* at 58a, since individual States may be "motivated to adopt lower standards of endangered species protection in order to attract development," *id.* at 60a. She noted in that regard that "the statute in this case regulates the taking of endangered species in the process of constructing a hospital, power plant, and intersection that will likely serve an interstate population." *Id.* at 63a.

B. Judge Henderson filed a concurring opinion. Pet. App. 66a-72a. She explained that, "[g]iven the interconnectedness of species and ecosystems, it is reasonable to conclude that the extinction of one species affects others and their ecosystems and that the protection of a purely intrastate species (like the Delhi Sands Flower-Loving Fly) will therefore substantially affect land and objects that are involved in interstate commerce." *Id.* at 70a. Judge Henderson found it "particularly obvious" (*ibid.*) that application of the ESA would be constitutional in the instant case, since "both the proposed redesigned traffic intersection and the hospital it is intended to serve" would have "an obvious connection with interstate commerce." *Id.* at 71a.

C. Judge Sentelle dissented. Pet. App. 72a-91a. Relying principally on this Court's decision in *United States* v. *Lopez*, 514 U.S. 549 (1995), Judge

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substantial effect on interstate commerce, it does not matter that it is impossible to calculate the exact impact of the extinction of a single species such as the Fly." Pet. App. 55a n.14 (internal quotation marks omitted).

Sentelle concluded that application of the ESA to the instant case lay beyond Congress's authority under the Commerce Clause. He asserted that "[t]he fly is not an article of interstate commerce, and does not travel the channels of interstate commerce." Pet. App. 80a n.1. Judge Sentelle also rejected the contention that the ESA's "take" prohibition should be upheld as a regulation of activities substantially affecting interstate commerce. In his view, "[t]here [wa]s no showing, but only the rankest of speculation, that a reduction or even complete destruction of the viability of the Delhi Sands Flower-Loving Fly will in fact affect land and objects that are involved in interstate commerce, let alone do so substantially." *Id.* at 86a-87a (internal quotation marks omitted).

ARGUMENT

The court of appeals' decision is correct and does not conflict with any decision of this Court or any other court of appeals. Further review is not warranted.

1. This Court has long recognized that protection of fish and wildlife is a legitimate subject of congressional regulation. See *Missouri* v. *Holland*, 252 U.S. 416 (1920) (sustaining the Migratory Bird Treaty Act against challenges that it exceeded Congress's treaty-making powers and infringed on powers reserved to the States under Tenth Amendment); *Douglas* v. *Seacoast Products, Inc.*, 431 U.S. 265 (1977) (Congress had power under the Commerce Clause to regulate the taking of fish from state waters, thus preempting conflicting state laws); *Andrus* v. *Allard*, 444 U.S. 51, 63 n.19 (1979) (the "assumption that the national commerce power does not reach migratory wildlife is clearly flawed"); *North Dakota* v. *United*

States, 460 U.S. 300, 309 (1983) ("The protection of migratory birds has long been recognized as 'a national interest of very nearly the first magnitude.'") (quoting *Holland*, 262 U.S. at 435).

This Court has not squarely addressed the question whether enactment of the ESA, or its application to particular factual settings, is a valid exercise of congressional authority under the Commerce Clause. In resolving questions concerning the proper construction of the Act, however, the Court has recognized Congress's concern "about the *unknown* uses that endangered species might have and about the *unforeseeable* place such creatures may have in the chain of life on this planet." *TVA* v. *Hill*, 437 U.S. 153, 178-179 (1978). The Court in *TVA* relied on the Act's legislative history, which emphasized the "incalculable" value of endangered species as "potential resources" and "keys to puzzles which we cannot solve." *Id.* at 178 (quoting House Report at 4-5). In *Babbitt* v. *Sweet Home Chapter of Communities*, 515 U.S. 687, 699 (1995), the Court held that "Congress' intent to provide comprehensive protection for endangered and threatened species supports the permissibility of the Secretary's 'harm' regulation." While not dispositive of the constitutional question, the Court's decisions interpreting and applying the ESA provide no support for petitioners' contention that the Act's "take" prohibition exceeds Congress's powers under the Commerce Clause.

2. Petitioners argue (Pet. 5-15) that the proper interpretation of this Court's decision in *United States* v. *Lopez*, 514 U.S. 549 (1995), is the subject of general confusion and uncertainty in the lower federal courts. For two reasons, that contention

provides no ground for this Court to review the decision of the court of appeals.[7]

A. Petitioners do not contend that the courts of appeals are divided with respect to the constitutionality of the ESA generally, or of the "take" prohibition in particular. Indeed, petitioners cite no decision holding any application of the ESA to be unconstitutional.[8] Absent any disagreement among the lower

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[7] Contrary to the suggestion of amicus Defenders of Property Rights (see Br. 16-18), this case does not present a suitable vehicle for determining when FWS's administration of ESA Section 9(a)(1)(B) might effect a taking of private property requiring payment of just compensation under the Fifth Amendment. First, the issue is not fairly included within the question presented in the petition for a writ of certiorari. Second, petitioners did not assert a Fifth Amendment claim in the courts below, and nothing in the record suggests that petitioners have been "denie[d] all economically beneficial or productive use of land." *Lucas* v. *South Carolina Coastal Council*, 505 U.S. 1003, 1015 (1992).

[8] In *Palila* v. *Hawaii Department of Land & Natural Resources*, 471 F. Supp. 985 (D. Haw. 1979), aff'd, 639 F.2d 495 (9th Cir. 1981), the district court upheld Section 9 of the ESA against a similar challenge that it exceeded congressional power. The court explained that "a national program to protect and improve the natural habitats of endangered species preserves the possibilities of interstate commerce in these species and of interstate movement of persons, such as amateur students of nature or professional scientists who come to a state to observe and study these species, that would otherwise be lost by state inaction." 471 F. Supp. at 995. It concluded that "[t]he Endangered Species Act is a valid exercise of Congressional power pursuant to the treaty-making power and the Commerce Clause of the Constitution." *Id.* at 999. In *United States* v. *Bramble*, 103 F.3d 1475, 1480-1481 (9th Cir. 1997), the court of appeals expressly reaffirmed the rationale of *Palila* in the course of upholding the Bald Eagle Protection Act, 16 U.S.C. 668 *et seq.* The court observed that "[e]xtinction of the

courts regarding the constitutionality of the ESA, the instant case would not warrant this Court's review even if petitioners could demonstrate the existence of a circuit conflict, or substantial confusion in the courts of appeals, with respect to the status under *Lopez* of *other* federal statutes.

B. In any event, petitioners have not identified a circuit conflict with respect to the constitutionality, under *Lopez*, of *any* federal statute or application thereof.[9] Although petitioners identify several cases (see Pet. 7-13) in which members of appellate panels have disagreed as to the proper application of *Lopez*, the existence of non-unanimous court of appeals decisions is neither unusual nor a proper basis for invoking this Court's review. The fact (see Pet. 13-15) that the courts of appeals have sometimes disagreed with (and therefore reversed) district court decisions in cases presenting *Lopez*-related issues is

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eagle would substantially affect interstate commerce by foreclosing any possibility of several types of commercial activity: future commerce in eagles or their parts; future interstate travel for the purpose of observing or studying eagles; or future commerce in beneficial products derived either from eagles or from analysis of their genetic material." 103 F.3d at 1481. Petitioners cite no contrary authority, and we are aware of none.

[9] Although petitioners contend (Pet. 6) that "the circuits cannot agree on the meaning of *Lopez*," they assert only that various courts of appeals have employed different modes of analysis in resolving *Lopez*-based challenges to different statutory and regulatory provisions. Because "[t]his Court 'reviews judgments, not statements in opinions,' " *California* v. *Rooney*, 483 U.S. 307, 311 (1987) (per curiam) (quoting *Black* v. *Cutter Laboratories*, 351 U.S. 292, 297 (1956)), that assertion provides an inadequate basis for seeking this Court's review.

an even more insubstantial justification for seeking review by this Court.

Petitioners cite only two court of appeals decisions—*United States* v. *Wilson*, 133 F.3d 251 (4th Cir. 1997), and *United States* v. *Pappadopoulos*, 64 F.3d 522 (9th Cir. 1995)—that have invalidated federal government actions on the basis of this Court's decision in *Lopez*. Those cases do not support petitioners' constitutional claim. In *Wilson*, a defendant convicted of criminal violations of the Clean Water Act, 33 U.S.C. 1251 *et seq.*, contended that jury instructions defining the statutory term "waters of the United States"—instructions that closely tracked the language of an Army Corps of Engineers regulation, which defined the term to include isolated waters whose degradation or destruction "could affect" interstate or foreign commerce—had given the term an unduly broad scope. 133 F.3d at 256. The Fourth Circuit stated that such a definition, if embodied in the Act itself, would create serious constitutional difficulties. It concluded, however, that it need not resolve the constitutional question, holding instead that the Corps had exceeded its statutory authority in promulgating the rule. *Id.* at 256-257. In *Pappadopoulos*, the Ninth Circuit held that a particular act of arson had not been shown to have the effect on interstate commerce required by 18 U.S.C. 844(i). 64 F.3d at 527. Quite apart from the fact that neither of those decisions involved the ESA or protection of wildlife generally, neither decision invalidated an Act of Congress or any provision thereof.[10]

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[10] Amicus Pacific Legal Foundation is also wrong in contending (Br. 12-14) that the decision below conflicts with the

3. The decision of the court of appeals is correct. Petitioners do not contest the proposition that takings of endangered species will, in the aggregate, have a substantial effect on interstate commerce. They argue instead that application of the ESA's "take" prohibition to the Delhi Sands Flower-Loving Fly exceeds Congress's authority under the Commerce Clause because the Fly "lack[s] any economic significance whatsoever." Pet. 4. That argument is flawed in two respects.

A. This Court has squarely held that "[w]here the *class of activities* is regulated and that *class* is within the reach of federal power, the courts have no power to excise, as trivial, individual instances of the class." *Perez* v. *United States*, 402 U.S. 146, 154 (1971) (internal quotation marks omitted). The Court specifically reaffirmed that principle in *Lopez*, quoting with approval its prior statement that "where a general regulatory statute bears a substantial relation to commerce, the *de minimis* character of individual instances arising under that statute is of

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rulings of the Seventh and Ninth Circuits in *Hoffman Homes, Inc.* v. *Administrator, EPA*, 999 F.2d 256 (7th Cir. 1993), and *Leslie Salt Co.* v. *United States*, 55 F.3d 1388 (9th Cir.), cert. denied, 516 U.S. 955 (1995). Neither case involved the ESA, and neither case involved a successful Commerce Clause challenge to an Act of Congress or other federal action. Although the Seventh Circuit in *Hoffman Homes* held that the Environmental Protection Agency had misapplied its own regulation, it did not cast doubt on the regulation itself, which provides that use by migratory birds is a sufficient basis for federal regulation of wetlands under the Clean Water Act. See 999 F.2d at 261-262. The Ninth Circuit in *Leslie Salt* relied on law of the case principles in upholding a similar Army Corps of Engineers regulation against statutory and constitutional challenge. See 55 F.3d at 1394-1396.

no consequence." *Maryland* v. *Wirtz*, 392 U.S. 183, 197 n.27 (1968) (quoted in *Lopez*, 514 U.S. at 558). Section 9(a)(1)(B) of the ESA regulates takings of all species that have met the strict criteria for listing by the Secretaries as endangered or threatened. 16 U.S.C. 1538(a)(1)(B). Disaggregation of that class into component species, or particular members of a species, is inconsistent with this Court's precedents. See Pet. App. 55a n.14 ("because we know that in the aggregate the extinction of endangered species will have a substantial effect on interstate commerce, it does not matter that it is impossible to calculate the exact impact of the extinction of a single species such as the Fly") (Wald, J.) (internal quotation marks omitted). Such an approach is also contrary to Congress's view that species are part of an interdependent web, the value of which transcends the value of the individual species that make it up. See House Report at 4-5.

B. Even if it were appropriate to focus the Commerce Clause inquiry on the specific conduct at issue in this case, petitioners' constitutional challenge would fail. As the district court observed, "the government has offered uncontroverted evidence that the Fly is, and would likely continue to be, an article in interstate commerce." Pet. App. 18a; see nn. 3, 5, *supra*. The court explained that the Fly "is currently on exhibit in at least three museums located outside of the state of California" and "has been the subject of interstate trade among insect collectors." *Ibid.* Congress could reasonably seek to preserve

the possibility of future commerce in the Fly by protecting the remaining members of the species.[11]

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[11] The goal of the ESA is not simply to keep endangered species on the razor's edge between survival and extinction, but to assist in recovering the species to the point that it no longer requires extraordinary protection. See, *e.g.*, 16 U.S.C. 1533(f) (recovery plans); see generally Jason M. Patlis, *Recovery, Conservation, and Survival Under the Endangered Species Act: Recovering Species, Conserving Resources, and Saving the Law*, 17 Pub. Land & Res. L. Rev. 55, 56 (1996) (ESA "seeks not only to arrest the decline of those species on the brink of extinction, but to bring about their recovery so that they can assume their natural role in the ecosystem").

The statement of the dissenting judge below that "[t]he fly is not an article of interstate commerce, and does not travel the channels of commerce," Pet. App. 80a n.1, appears simply to reflect the fact that commercial traffic in the Fly is *currently* prohibited as a result of its listing as an endangered species. See 16 U.S.C. 1538(a)(1)(D)-(F). But while the ESA proscribes interstate commerce in an endangered species for so long as the species remains listed, the Act's protective measures may nevertheless serve, in the long term, to facilitate future commerce in the species after recovery efforts are complete. See *Palila*, 471 F. Supp. at 995 (explaining that "a national program to protect and improve the natural habitats of endangered species preserves the possibilities of interstate commerce in these species"); cf. *Bramble*, 103 F.3d at 1481 (upholding the Bald Eagle Protection Act, 16 U.S.C. 668 *et seq.*, as a valid exercise of Commerce Clause authority, and observing that "[e]xtinction of the eagle would substantially affect interstate commerce by foreclosing any possibility of several types of commercial activity," including "future commerce in eagles or their parts"). If the protection of endangered species bears a constitutionally sufficient nexus to interstate commerce, Congress's decision to impose a ban on commercial activity pending restoration of the species cannot destroy that nexus or render the ESA's other protective measures unconstitutional. See Pet. App. 18a n.17.

As both members of the court of appeals majority observed, moreover, Congress's authority to prohibit takings of an endangered species is especially clear where (as here) the taking is accomplished by commercial activity having an obvious interstate nexus. See Pet. App. 63a (Wald, J.) (noting that "the statute in this case regulates the taking of endangered species in the process of constructing a hospital, power plant, and intersection that will likely serve an interstate population"); *id.* at 70a-71a (Henderson, J., concurring) (finding it "particularly obvious" that application of the ESA would be constitutional in the instant case, since "both the proposed redesigned traffic intersection and the hospital it is intended to serve" would have "an obvious connection with interstate commerce"). Congress has well-established power "to keep the channels of interstate commerce free from immoral and injurious uses," *Lopez*, 514 U.S. at 558 (quoting *Heart of Atlanta Motel, Inc.* v. *United States*, 379 U.S. 241, 256 (1964)), even where the injury to be averted is noncommercial in nature. See, *e.g.*, *United States* v. *Darby*, 312 U.S. 100, 114-116 (1941). The ESA's "take" prohibition would therefore be constitutional as applied to commercial activities such as the construction project at issue in this case, even if its application to wholly non-commercial conduct lay beyond Congress's authority.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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